

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ALEXANDER JEREMIAH BROWN,
Petitioner.

No. 2 CA-CR 2014-0301-PR
Filed September 29, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County

No. CR2003020308001DT

The Honorable Douglas L. Rayes, Judge

REVIEW GRANTED; RELIEF DENIED

Alexander Jeremiah Brown, Florence
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Petitioner Alexander Brown seeks review of the trial court's order dismissing his successive, untimely notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Pursuant to a plea agreement, Brown was convicted of two counts of child abuse in 2004, and the trial court sentenced him to a presumptive, seventeen-year prison term to be followed by a lifetime term of probation. Also in 2004, Brown filed his first notice of post-conviction relief, which the court dismissed pursuant to Brown's request. In 2006, he filed a successive notice and petition for post-conviction relief, in propria persona, claiming trial counsel was ineffective, his plea was coerced, and his late filing was "without fault" on his part. Although Brown filed his petition on the same day as his notice, the court summarily dismissed the notice, finding his claim precluded.

¶3 Brown filed a third notice of post-conviction relief in 2013, again asserting his failure to file a timely notice was "without fault" on his part pursuant to Rule 32.1(f), and that trial counsel improperly had advised him to enter into a plea agreement that had expired before it was fully executed, rendering the agreement void. In its ruling dismissing Brown's notice, the trial court correctly concluded that, because this is not an "of-right" Rule 32 proceeding, Brown is not entitled to relief under Rule 32.1(f) (defendant's failure to file of-right notice of post-conviction relief in prescribed time without fault on defendant's part). The court also rejected Brown's

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claim that his plea agreement is void, correctly concluding he could not raise this argument in an “untimely or successive Rule 32 proceeding because an untimely notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h),” none of which, the court noted, applies here. *See* Ariz. R. Crim. P. 32.4(a) (“Any notice [of post-conviction relief] not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).”); *see also* Ariz. R. Crim. P. 32.2(b) (notice in untimely post-conviction proceeding must “set forth the substance of the specific exception [to timeliness] and the reasons for not raising the claim in . . . a timely manner”).

¶4 On review, Brown argues that by having entered into a plea agreement in January 2004 which contained language stating the offer would “expire[] and is revoked if not entered . . . by November 25, 2003,” the agreement was rendered void. He also asserts the trial court ignored his “Commercial Affidavit of Truth,” which he contends establishes an admission of deficient performance by trial counsel for having advised him to enter into an expired plea agreement, and thus asks that we vacate his guilty plea and “remand this case for a ‘TRUE’ Plea.” Because Brown has failed to demonstrate why he did not raise this claim until more than nine years after he pled guilty or why the court erred by finding his notice untimely, we find no abuse of discretion in the court’s dismissal of that notice. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain “reasons why the petition should be granted”).

¶5 In addition, to the extent Brown attempts to raise for the first time on review “[a]nother error” that “has surfaced since the initial mailing” of the notice of post-conviction relief, specifically that someone “tampered with” the plea agreement after he signed it, we do not address that claim.¹ *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review should contain “issues

¹We note that in July 2014, we denied Brown’s motion to supplement the record on appeal with this argument.

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which were decided by the trial court and which the defendant wishes to present to the appellate court for review”). We similarly do not address Brown’s assertion, also raised for the first time on review, that his claims were of sufficient constitutional magnitude to avoid preclusion. See Ariz. R. Crim. P. 32.2(a)(3) cmt. (“If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant ‘knowingly, voluntarily and intelligently’ waived the claim.”); see also *State v. Lopez*, 234 Ariz. 513, ¶ 8, 323 P.3d 1164, 1166 (App. 2014) (defendant may not raise claim based on sufficient constitutional magnitude in untimely post-conviction proceeding).

¶6 Accordingly, although we grant the petition for review, we deny relief.